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TEACHER IN PUBLIC SCHOOLS — BOARD OF EDUCATION — NOT LIABLE IN DAMAGES TO PUPIL SUBJECTED TO UNDUE AND EXCESSIVE PUNISHMENT BY TEACHER — TIME OF EMPLOYMENT BOARD HAD KNOWLEDGE HIGH TEMPER OF TEACHER AND PRIOR ACTS, EXCESSIVE PUNISHMENT.

SYLLABUS:

A board of education is not liable in damages to a school pupil who has been subjected to undue and excessive corporal punishment by a teacher in the public schools, even though the teacher at the time of his employment may have been known to the board of education to be a man of high temper and one who had on previous occasions inflicted excessive corporal punishment on the pupils.

Columbus, Ohio, March 1, 1941.

Hon. Theodore Tilden, Prosecuting Attorney,
Ravenna, Ohio.

Dear Sir:

I acknowledge receipt of your request for my opinion which is as follows:

"Mr. 'A' is the principal of a certain school in Portage County. It is generally conceded that he is a man of high temper, and on one particular occasion he sought to correct a pupil who was allegedly disobedient, and inflicted corporal punishment upon him. The pupil was a victim of infantile paralysis, and the disease had affected his left arm and shoulder so that the same was not normal. However, the circumstances might be, the fact of the matter is that the boy either fell or was thrown to the floor, and because of the previous impairment he suffered injuries to his arm and shoulder which thereafter required hospitalization.

It was alleged by the father of the boy and by other witnesses, pupils in the school, that the principal lost his temper and threw the boy to the floor. Attorneys for the father of the boy made claim against the principal for the injuries to the boy and some time thereafter the principal paid a substantial sum in damages for the injuries inflicted upon the boy.

The Board of Education of the particular school is now desirous of knowing whether there would be any civil liability upon their board for the acts of corporal punishment by this teacher in the future should they retain him, notwithstanding the fact that they have knowledge of his mode of punishing pupils. It is also a fact that the board has knowledge of several other incidents of corporal hurt upon pupils previous to the one herein mentioned."

In Ohio Jurisprudence, Vol. 36, page 355, it is stated:

"All authorities agree that a school teacher may inflict corporal punishment. To enable him to discharge effectually his duties of maintaining good order and deportment among his pupils, it is necessary that he have the power to enforce prompt obedience to his lawful commands, for which reason the law gives him the power, in proper cases, to inflict corporal punishment on refractory pupils, whether he is a teacher in a public or a private school. There is no legislation in Ohio against corporal punishment. A teacher has the same right as a parent, in pursuance of the rules of the school known to the parents, to inflict reasonable corporal punishment upon a pupil deserving it."

It is well settled, however, that while a teacher has a right to punish a pupil in a proper manner and to a proper degree, the punishment must be reasonable, and not cruel or excessive or actuated by malice or passion. If the teacher punishes the pupil beyond the bounds of moderation, under all the circumstances he is personally liable civilly for the consequences of his acts and in some instances he becomes criminally liable. See Ruling Case Law, Vol. 24, pages 638 to 643, inclusive; Quinn v. Nolan, 7 O. Dec. Rep. 585; Martin v. State, 11 O.N.P. (N.S.), 183, affirmed by the Circuit Court, which is affirmed by the Supreme Court without opinion, 87 O.S., 459; State v. Henderson, Dtn. 353.

Liability for damages, however, under no circumstances extends to the board of education of the school district when a teacher who punishes a pupil to such an extent and in such a manner as to subject the teacher to liability for damages for the reason as will hereinafter appear that the board in the employment of the teacher acts as an agent of the State and in a governmental capacity, and under such circumstances, the rule known as respondant superior, upon which all liability of an employer or master in tort for the acts of servant or agent is predicated, does not apply.

The common school system of Ohio is a distinct department of the government of the State of Ohio, which has as its object the education of the people and children of the state. Ohio Jurisprudence, Vol. 36, page 133. A school district is a political organization unknown to the Constitution, the mere creation of legislative enactment organized as a mere agency of the state in maintaining the public schools, all of its functions being of a public nature. Ohio Jurisprudence, Vol. 36, page 86; State v. Powers, 38 O.S., 54, overruled in State ex rel. v. Shearer, 46 O.S., 275, which is overruled in State v. Spellmire, 67 O.S., 77.

In Ohio Jurisprudence, Vol. 36, page 168, it is said:

> "Boards of education are purely the creatures or creations of statute. They are organizations subject to the control of the legislature and constitute instruments by which the legislature administers the department of the civil administration of the state which relates to education and the schools. In other words, they are agents of the state for the purpose of carrying on the affairs of the state, known as public school agents, — that is, they are the arms, agencies, or instrumentalities of the state for the promotion of education throughout the state by the establishment of a state-wide system of common schools, or agencies of the state for the organization, administration, and control of the public school system of the state separate and apart from the usual political and governmental functions of other subdivisions of the state.
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> The board of education is a body corporate, but it is not a corporation within the provisions of the statutes governing corporations or a corporation for profit, as it owns no property except in a trust capacity for the purposes defined by the statute. It is a corporation of a public nature charged with the performance of public duties, but is not a municipal corporation. Owing to the very limited number of corporate powers conferred upon them, boards of education rank low in the grade of corporate existence and hence, are properly denominated quasi corporations to distinguish them from municipal corporations — such as cities

> or towns operating under charters — which are vested with more extended powers and a larger measure of corporate life."

Many authorities are cited in support of the text. An examination of these authorities discloses that the Supreme Court of Ohio in a large number of cases has definitely in terms stated that boards of education are mere agencies of the State of Ohio, in view of which there is probably no proposition of law more definitely established in this state than that in the absence of statute, a board of education or a school district is not liable in tort to third persons for negligence or for any acts of the board as such or any employes of the board. The reason for this rule usually given is that a board of education being a mere agency of the state, acts for and on behalf of the state in the performance of its duties and is therefore incapable of performing a wrongful or negligent act which must necessarily exist before liability in tort arises. It therefore is held to enjoy immunity from such liability equal with that of the state itself.

In 1876, the Supreme Court of Ohio, in the case of Finch v. Board of Education of Toledo, 30 O.S., 37, 27 American Rep., 414, held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability."

Another case where the Supreme Court carries this doctrine to the extent of holding that a board of education can not be held liable for damages under circumstances amounting practically to trespass, is the case of Board of Education of Cincinnati v. Volk, 72 O.S., 469, where it is held:

> "A board of education is not liable in its corporate capacity for damages, where, in excavating on its own lots for the erection of a school building it wrongfully and negligently carries the excavation below the statutory depth of nine feet, thereby undermining and injuring the foundation and walls of a building of an adjoining owner."

In the course of the opinion of Judge Price in the above entitled case, it is stated with reference to the board of education which was being sued:

> "The board is not authorized to commit a tort, — to be careless or negligent, and when it commits a wrong or tort, it does not in that respect represent the district, and for its negligence or tort in any form, the board cannot make the district liable."

In McHenry v. Board of Education of Cincinnati, 106 O. S., 357, the holding of the Supreme Court is peculiarly applicable to the question submitted by you. In that case it appeared that suit had been brought against the board of education of the City of Cincinnati to recover damages claimed to have been sustained by a pupil in the public schools of the said city from the extraction of a tooth by a dentist in the employment of the Board of Education of the City of Cincinnati to whom the principal of one of the public schools of the city required that a pupil submit himself for examination and treatment without the consent or knowledge of his parents. The petition in that case averred:

> "That said dentist, or pretended dentist, who was in the employ of defendant and authorized by defendant to operate upon said William McHenry, Jr., was negligent in fracturing the jaw bone of said William McHenry, Jr.; that said dentist, or pretended dentist, was incompetent to operate * * and that he was incompetent to determine whether or not the jaw bone of his patient had been fractured or to treat the same if fractured, and *that defendant was negligent in employing for such work an unfit and incompetent person.*" (Emphasis mine.)

A demurrer was filed to this petition, which demurrer was sustained by the Court of Common Pleas. The holding of the Court of Common Pleas was reversed by the Court of Appeals (Board of Education v. McHenry, Jr., 31 O.C.A., 589.) The holding of the Court of Appeals was reversed by the Supreme Court thereby in effect sustaining the demurrer.

In my opinion the principle there involved was substantially the same as that involved in the question you submit, and I am therefore of the opinion in specific answer to your question that the board of education of the school district referred to, cannot be held in damages for any acts of the teacher in question even though the teacher may have been known at the time he was employed to be a man of high temper and that he had on several occasions inflicted corporal punishment on pupils to such an extent and in such manner as to be beyond the bounds of moderation and so as to cause him to be liable to the public in damages for the excessive infliction of corporal punishment under all the circumstances.

Respectfully,

THOMAS J. HERBERT,
Attorney General.